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QUESTION PRESENTED

Whether the doctrine of *Teague v. Lane* bars relief based upon *Espinosa v. Florida* in habeas corpus proceedings?

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STATEMENT OF THE CASE

On February 5, 1983, Petitioner Cary Lambrix and his girlfriend, Francis Smith, met another couple in a tavern and ultimately both couples returned to Lambrix's trailer to eat spaghetti (R. 2188, 2190-91, 2204). The trailer was located on a rural, wooded piece of property near LaBelle, Florida (R. 2183-84). According to Francis' testimony at trial, Francis and Alicia Bryant were cooking the spaghetti when Lambrix asked Clarence Moore (aka Lawrence Lamberson) to accompany him outside, to the back of the trailer to see some plants (R. 2205). Francis thought this unusual as she knew there were no plants in the back (R. 2206-07). About twenty minutes later, Lambrix returned alone and told Alicia that Moore wanted her to come out and see the plants (R. 2207-08). Alicia told Francis to come with her, but Lambrix directed Francis inside to watch the spaghetti (R. 2208-09). Lambrix returned in about forty-five minutes, bloody, and threw a tire tool on the floor, telling Francis that Alicia and Moore were dead (R. 2209-11). When Francis asked Lambrix about the blood, he told her that Alicia had spit blood into his mouth (R. 2212). Lambrix cleaned up then ate a plate of spaghetti (R. 2211-12).

Lambrix told Francis that he had hit Moore in the head with the tire tool and choked Alicia, then stomped on Alicia's head (R. 2213). He stated that Moore was easy and had presented no difficulty, but that Alicia had put up a real fight (R. 2213). Alicia had ducked when Lambrix swung the tire tool at her, and then run; he had to chase her (R. 2213). Lambrix told Francis she was going to help him bury the two bodies; if she did not, he would bury her between them (R. 2213-14). They drove Moore's car to a convenience store and bought a flashlight, then borrowed a shovel from a neighbor (R. 2214-17).

Francis followed Lambrix behind the trailer and Lambrix led her to Moore's body (R. 2218-19). Moore was lying on his back, and the top of his head was caved in with blood all over the side of his face (R. 2219). Lambrix and Francis went through a fence and Francis held the flashlight while Lambrix started digging a grave (R. 2220). Lambrix had Francis lie in the grave to check its depth (R. 2220). He returned to Moore's body, took a gold necklace from Moore and went through Moore's pockets (R. 2221). As Lambrix dragged Moore by the feet to his grave, Francis heard a horrible, unusual noise, which Lambrix explained was the air escaping from Moore's lungs (R. 2222). Lambrix rolled Moore face down into the grave and covered him up (R. 2222-23).

Lambrix then walked down the fence line to find a place for another grave (R. 2223). He had Francis lay down to measure the area (R. 2224). After digging the grave, he led Francis to Alicia's body (R. 2224). Alicia was lying face down in a pond, with her pants partially pulled down (R. 2225). Lambrix dragged Alicia to her grave by her feet, with Alicia making the same noise Francis had heard with Moore (R. 2226-27). Lambrix rolled Alicia face down into the grave and covered her up (R. 2227). Lambrix told Francis that Alicia had been in the pond so that, in case she was not dead when he left her, she would drown (R. 2334). He later made statements to state witness Debra Hanzel indicating that he had killed the victims in order to obtain Moore's car (R. 2449).

After burying the bodies, Lambrix and Francis returned to the trailer (R. 2229). Lambrix told Francis to pack a few things, that they were going to Lambrix's sister's house (R. 2229). They left the trailer as it was and took Moore's car, driving several hours to the sister's house near Plant City, Florida (R. 2229-31). Along the way, Lambrix discarded the tire tool and his bloody shirt off a bridge into some water (R. 2231-32).

Testimony by the associate medical examiner corroborated Francis' testimony and Lambrix's statements as to the manner in which Bryant and Moore were killed. Dr. Robert Schultz testified that both bodies were in an advanced state of decomposition at the time of the autopsies (R. 2038, 2045, 2056). Schultz noted that Bryant had lacerations on one ear and a hand; he described these injuries as nonlethal but painful (R. 2046, 2050). In Schultz's opinion, the cause of Bryant's death was manual strangulation (R. 2073, 2077). Moore's death was caused by multiple, severe crushing injuries to his skull (R. 2056, 2064). Schultz stated that there were at least ten separate blows to Moore: four to each side of his head, one to his back which punctured his chest, and one to his right ear (R. 2058). The wound to his back was probably inflicted while Moore was dead or near death (R. 2065). The wounds were all inflicted by a hard, round, stick-like object, such as the tire jack that had been admitted into evidence, which also had a sharp wedge point which could have caused the wound to the back (R. 2068-2069).

Lambrix was convicted of two counts of first degree murder. After a separate sentencing proceeding, the jury was instructed to determine whether sufficient aggravating circumstances existed to justify the imposition of the death penalty and, if so, whether sufficient mitigating circumstances existed to outweigh any aggravating circumstances found to exist (J.A. 8, R. 2662). The specific aggravating circumstances which the jury was instructed it could consider were: crime committed while under sentence of imprisonment (Section 921.141(5)(a), Florida Statutes (1983)); crime committed while engaged in the commission of a robbery (Section 921.141(5)(d), Florida Statutes (1983)); crime committed for financial gain (Section 921.141(5)(f), Florida Statutes (1983)); crime was especially wicked, evil, atrocious or cruel (Section 921.141(5)(h), Florida Statutes (1983)); and crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal

justification (Section 921.141(5)(i), Florida Statutes (1983)) (J.A. 9, R. 2663). The jury was instructed that the circumstances that the murders were committed during a robbery and committed for financial gain could only be considered as one circumstance if their existence was proven beyond a reasonable doubt (J.A. 13, R. 2668). The jury was also instructed that if the evidence showed death had been caused by one or more of numerous wounds to the decedent, a finding of especially heinous, atrocious or cruel was justified (J.A. 13, R. 2668).

The jury recommended a death sentence as to victim Moore by a vote of eight to four and recommended a death sentence as to victim Bryant by a vote of ten to two (R. 1347-48). The trial judge imposed sentences of death, finding the murders were committed by a person under sentence of imprisonment; the defendant had been previously convicted of another capital felony (based on the contemporaneous murders, pursuant to Section 921.141(5)(b)); the murder of Moore was committed for pecuniary gain; and both murders were especially heinous and atrocious and cold, calculated and premeditated (J.A. 20, R. 1354-55).

Lambrix's convictions and sentences were affirmed by the Florida Supreme Court on appeal, and the applicability of all of the aggravators was specifically upheld. Lambrix v. State, 494 So. 2d 1143, 1148 (Fla. 1986). Lambrix, however, raised no claim of error on appeal in regard to any of the jury instructions on the aggravating circumstances indeed he raised no penalty issue at all. Certiorari review to this court was not sought. Thereafter, Lambrix sought postconviction relief under Florida Rule of Criminal Procedure 3.850. For the first time, Lambrix asserted in his postconviction motion issues challenging the correctness of his death sentences. Included were the following:

> THE FLORIDA SUPREME COURT HAS INTERPRETED "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER AND APPLIED THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF MAYNARD V. CARTWRIGHT, 108 S.CT. 1853 (1988), AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

(J.A. 34, 3.850 Record at 88).

> THE FLORIDA SUPREME COURT HAS INTERPRETED "COLD, CALCULATED AND PREMEDITATED" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER AND APPLIED THAT AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

(J.A. 42, 3.850 Record at 95). The state moved to dismiss the entire postconviction motion as untimely. Alternatively, the state asserted that these claims were procedurally barred due to Lambrix's failure to raise them or any sentencing issue on direct appeal (3.850 Record at 109-110, 117, 130-132). The postconviction court denied the motion to dismiss, noting that it recognized merit in the state's motion. The Court, however, denied all relief and addressed only those claims on the merits dealing with Lambrix's challenges to the effectiveness of trial counsel. On appeal, Lambrix limited his appellate issues to

those matters dealing with his alleged intoxication, see, Lambrix v. State, 534 So. 2d 1151 (Fla. 1988), at 1152: "Lambrix's [postconviction] motion asserted a number of claims. However, his appeal addresses only two issues, both of which are related to his consumption of alcohol."

When the challenge to the aggravating factors were presented in Lambrix's federal petition for writ of habeas corpus, the state maintained that the claims had been procedurally barred in state court (J.A. 48-49, 51, 53, 63, 64). In an amendment to Lambrix's petition for writ of habeas corpus, the claims were restated as

> APPLICATION OF THE AGGRAVATING FACTOR OF 'ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL' TO THE PRESENT CASE WAS IN VIOLATION OF THE RULE ADOPTED IN MAYNARD V. CARTWRIGHT.

and

> APPLICATION OF THE 'COLD, CALCULATED AND PREMEDITATED' FACTOR TO THE PRESENT CASE WAS ARBITRARY AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

(J.A. 57, 60). The federal district judge, rejecting the state's assertion of a procedural bar as to these claims, denied relief on the merits. In doing so, the court noted that the Florida Supreme Court had properly narrowed the construction of the two aggravating factors at issue, and that the sentencing trial judge was presumed to know and apply the law and its narrow construction (J.A. 119, 121; Order at 54, 57).

During the pendency of Lambrix's appeal from the denial of habeas relief, Espinosa v. Florida, 505 U.S. 1079 (1992), was decided and thereafter was argued in Lambrix's initial brief. Respondent moved to hold the appeal in abeyance, alleging that the Espinosa claim had not been exhausted in state courts, and that the claim was distinct from the relevant claims presented to the federal district court because the prior claims attacked the validity of the aggravating factors, while the Espinosa claim attacked the jury instructions regarding those factors (J.A. 138). The Eleventh Circuit Court of Appeals granted Respondent's motion to hold the appeal in abeyance.

Lambrix then filed a state habeas petition in the Florida Supreme Court. That court held that Lambrix's Espinosa claim had been procedurally defaulted in state court when appellate counsel failed to raise any issue relating to the denial of the defense's requested jury instruction on the heinous, atrocious or cruel aggravator in Lambrix's direct appeal. See, Lambrix v. Singletary, 641 So. 2d 847, 848 (Fla. 1994). The case then returned to the Eleventh Circuit, which held that Lambrix's Espinosa claim was barred under Teague v. Lane, 489 U.S. 288 (1989), without reaching the state's contention of a valid state procedural bar. Lambrix v. Singletary, 72 F.3d 1500, 1503 (11th Cir. 1996). The Eleventh Circuit specifically found that the record supported both the heinous, atrocious or cruel and cold, calculated and premeditated factors. 72 F.3d at 1507.

SUMMARY OF THE ARGUMENT

The Teague v. Lane, 489 U.S. 299 (1989) retroactivity analysis conducted in Glock v. Singletary, 65 F.3d 878 (11th Cir. 1995), singularly relied upon in Lambrix v. Singletary, 72 F.3d 1500 (11th Cir. 1996), follows the mandates of this Court for habeas review of a claim premised on case law decided after the habeas petitioner's state court conviction and sentence became

final. The Glock opinion appropriately considers the relevant case law and reaches a well founded conclusion that Espinosa v. Florida, 505 U.S. 1079 (1992) was not dictated by the law in existence in 1986.

In Espinosa, this Court, contrary to Fla. Stat. 921.141, elevated the jury's role in Florida's capital sentencing procedure to one of co-sentencer. The characterization of the jury's role as equal to that of the trial judge was a profound change from the way that the State of Florida had constructed its death penalty proceedings. It was not a characterization that was dictated by prior law; indeed, a survey of the legal landscape at the time Espinosa was decided, including this Court's prior precedents, dictated that the jury's role was merely advisory. Accordingly, Espinosa constitutes "new law" for purposes of Teague review.

Espinosa, for the first time, extended Godfrey v. Georgia, 446 U.S. 420 (1980), to a case which factually supported the applicability of the factor as limited by state case law. Espinosa broke new ground by finding constitutional error in an insufficient jury instruction on an aggravating factor of "heinous, atrocious or cruel" even when the state sentencer and appellate court had adopted a narrow construction of the factor which was properly applied to the facts of the underlying case.

Even if the Eleventh Circuit's refusal to consider these claims under Teague was erroneous, Lambrix is not entitled to any relief. Albeit, the Eleventh Circuit did not address the state's procedural bar assertion, these claims were procedurally barred in state court, thus, there is an independent state law basis for the denial of relief, precluding federal review of the claims. Furthermore, since the facts of this case clearly support the applicability of both the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravators as narrowly construed by the Florida Supreme Court, and several other aggravating

factors were properly found to exist, any possible instructional error under Godfrey or Espinosa could not have injuriously affected the jury recommendation and must be considered harmless beyond a reasonable doubt.

Lambrix's contention that his challenge to the jury instruction defining the "cold, calculated and premeditated" aggravating factor is even less persuasive. This Court has never held this factor to be unconstitutionally vague, and the terms used in the factor are not inherently ambiguous. Lambrix never challenged the definition or the application of this factor in state court prior to the time that his convictions and sentences were final.

ARGUMENT

I. CONSIDERATION OF PETITIONER'S ESPINOSA V. FLORIDA CLAIM IN FEDERAL HABEAS PROCEEDINGS IS BARRED BY TEAGUE V. LANE.

A. Existing case law did not dictate Espinosa's characterization of the jury's role in Florida as equal to that of the sentencing judge.

In Lambrix v. Singletary, 72 F.3d 1500 (11th Cir. 1996), the court below rejected Petitioner's Espinosa claim by applying its Glock holding that the issue was Teague barred.[1] Although Lambrix's brief devotes little argument to addressing the Teague analysis conducted in Glock, that analysis is clearly the focus of the question accepted for review in this case.

In Teague v. Lane, 489 U.S. 299 (1989), this Court held that federal habeas review of state court judgments and sentences was limited by the law that was in effect at the time the judgments and sentences became final, with two narrow exceptions. In Glock v. Singletary, 65 F.3d 878 (11th Cir. 1995) (en banc), cert. denied, ___ U.S. ___, 117 S. Ct. 225 (1996) , the Eleventh Circuit conducted the thorough analysis required by Teague for consideration of a claim for relief predicated on Espinosa v. Florida, 505 U.S. 1079 (1992), and determined that Espinosa relief was barred under Teague for a conviction which became final in 1986. Glock is consistent with the applicable case law on Teague. The Eleventh Circuit carefully "surveyed the legal landscape" at the time Glock's conviction became final,[2] and determined that Espinosa was not dictated or compelled by existing law. 65 F.3d at 885-889. No error has

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[1] Lambrix asserts that the sentencing jury's consideration of the "especially heinous, atrocious or cruel" ("HAC") and "cold, calculated and premeditated" ("CCP") aggravating factors violated the Eighth Amendment because the jury was not given sufficient guidance concerning the application of these factors. See Maynard v. Cartwright, 486 U.S. 356, 359, 108 S.Ct. 1853, 1856, 100 L. Ed.2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 1765, 64 L. Ed. 2d 398 (1980). We assume arguendo that the jury was not given sufficient guidance on these factors.(footnote 4) However, the trial judge reweighed the aggravating and mitigating factors, and sentenced Lambrix to death. The state argues that the trial judge is presumed to know and apply the law in the narrow construction as required by Florida Supreme Court cases. Thus, the state argues that the sentencing judge's proper reweighing of the HAC and CCP factors cured any error in the jury's consideration of these factors. Under Espinosa, we now know that the sentencing judge's reweighing of aggravating factors is insufficient to cure consideration of those factors. 505 U.S. at 1081-82, 112 S.Ct. at 2928-29. However, on facts identical in all relevant respects to this case, the en banc court in Glock v. Singletary, (footnote 5) held that Espinosa's holding - i.e., a sentencing judge's proper reweighing does not cure the constitutional error - is a new rule which cannot be applied retroactively under Teague v. Lane, 489 U.S. 288 (1989). Thus, because Lambrix's conviction became final before the Espinosa decision announced the new rule, Lambrix's Espinosa claim is Teague-barred. Teague, 489 U.S. at 310, 109 S. Ct. at 1075.

Footnote 4 The jury was instructed that two of the aggravating circumstances *which they could consider were whether the* "crime for which the defendant is to be sentenced was especially wicked, atrocious, or cruel." and that the "crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." The only other instruction pertaining to either of these aggravating circumstances was given subsequently when the trial judge stated to the jury, "If the evidence shows beyond a reasonable doubt that the death was caused by one or more numerous wounds to the decedent, you may be justified in finding that the killing was especially heinous, atrocious or cruel."

Footnote 5 65 F. 3d 878 (11th Cir. 1995) (en banc).

[2] The Petitioner's conviction herein also became final in 1986.

been demonstrated in the Teague analysis used in Glock or in the application of this analysis to the instant case.

Lambrix contends that no Teague bar exists because the result in Espinosa was dictated by Godfrey v. Georgia, 446 U.S. 420 (1980). However, Godfrey found error in a jury instruction on a vague aggravating factor in a state where the jury actually imposed the capital sentence at issue. In addition, the vague aggravator in Godfrey was the only factor submitted to the jury for consideration. Godfrey also involved facts which did not fall within the narrow construction of the factor as it had been interpreted by the Georgia Supreme Court. Thus, as the Eleventh Circuit found in Glock, Godfrey itself did not dictate its applicability in a state where a judge rather than jury imposes the sentence, or in a case where other valid aggravating factors existed and where the facts themselves supported the application of the factor as properly limited by a state appellate court. 65 F.3d at 885-886.

Prior to 1986, this Court consistently described Florida as a judge-sentencing state. In Proffitt v. Florida, 428 U.S. 242 (1976), this Court noted that the jury's sentencing verdict in Florida was "only advisory; the actual sentence is determined by the trial judge." 428 U.S. at 249. This was the primary distinction noted between the Florida and the Georgia death penalty systems: "in Florida the sentence is determined by the trial judge rather than by the jury." 428 U.S. at 252. It was an important distinction since, according to Proffitt, "judicial sentencing should lead, if anything, to even greater consistency" in the imposition of capital punishment. Id. Furthermore, since "trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty," and since "the sentencing authority articulates in writing the statutory reasons that led to its decision," - reasons which are reviewed by the Florida Supreme Court for statewide consistency and fairness

- the Florida sentencing scheme was found to have passed constitutional muster.[3]

Moreover, Proffitt specifically rejected the substantive claim now urged by Lambrix. In rejecting the claim that the heinous, atrocious or cruel aggravator was unconstitutionally vague, this Court noted that the Florida Supreme Court had construed the factor narrowly, and held "[w]e cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." 428 U.S. at 255-256.

The characterization of the judge as the sentencer was reaffirmed in Spaziano v. Florida, 468 U.S. 447 (1984). Spaziano recognized that, under Florida law, a jury's sentencing recommendation "is only advisory" and that, "[n]otwithstanding the recommendation of a majority of the jury," a trial judge must conduct an independent weighing of the aggravating and mitigating circumstances and enter a sentence of life imprisonment or death. 468 U.S. at 451. In rejecting Spaziano's contention that a death sentence by a judge violated double jeopardy principles after the jury had recommended life, this Court held that judicial rather than jury sentencing was not prohibited by the Constitution and stated that since a judge could be vested with sole responsibility for sentencing, "then there is nothing constitutionally wrong with the judge's exercising that

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[3] Florida consciously chose this method of capital sentencing to address the concerns expressed by this Court in Furman v. Georgia, 408 U.S. 238 (1972). As the Florida Supreme Court noted in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), among the advantages of a judge-sentencing system would be the fact that "the inflamed emotions of jurors can no longer sentence a man to die." With judicial sentencing, it is submitted that the Florida Legislature expressly intended that any jury misunderstanding of the definition of an aggravating circumstance would play no critical part in determining the appropriateness of a death sentence.

responsibility after receiving the advice of the jury." 486 U.S. at 465.

Relevant case law from the Eleventh Circuit also supports the conclusion that Espinosa's finding of constitutional error due to a vague penalty phase jury instruction under Florida's sentencing scheme was not a settled principle of law in 1986. In Proffitt v. Wainwright, 756 F.2d 1500 (11th Cir. 1985), that court rejected a claim that any error regarding an unconstitutionally vague jury instruction on the heinous, atrocious or cruel aggravator could only be corrected by a new jury sentencing proceeding. In doing so, the court observed that Spaziano, "calls into question whether any given error in such a merely 'advisory' proceeding should be considered to be of constitutional magnitude." 756 F.2d at 1502. Later, in Hargrave v. Wainwright, 804 F.2d 1182 (11th Cir. 1986), vacated on grant of rehearing, 809 F.2d 1486 (11th Cir. 1987), the court held that any error in giving a vague jury instruction on the heinous, atrocious or cruel factor "was rendered harmless by the trial court's findings," where those findings, affirmed by the Florida Supreme Court, demonstrated that the proper narrow definition had been applied by the trial judge and the Florida Supreme Court. 804 F.2d at 1196, n. 33.

Prior to Espinosa, the Florida Supreme Court had consistently rejected the argument that Maynard v. Cartwright, 486 U.S. 356 (1988), affected Florida's death sentencing procedures.

> With regard to the first point, we have previously addressed the claim that the aggravating circumstance of heinous, atrocious, or cruel is impermissibly vague and does not provide the jury with enough guidance. This Court has expressly limited the definition of this aggravating factor in our opinion in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). Moreover, the use of this aggravating factor by trial judges, who are the actual sentencers in Florida, has been specifically approved. See, *Hildwin v. State*, 531 So. 2d 124 (Fla. 1988), *affirmed*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989).

Sanchez-Velasco v. State, 570 So. 2d 908, 916 (Fla. 1990), cert. denied, 500 U.S. 929 (1991). See also, Porter v. State, 559 So. 2d 201, 203 (Fla. 1990) ("Maynard does not affect Florida's death sentencing procedures"), cert. denied, ___ U.S. ___, 115 S. Ct. 1816 (1995); Clark v. State, 559 So. 2d 192, 194 (Fla. 1990); Smalley v. State, 546 So. 2d 720 (Fla. 1989). This rejection was founded on the theory that the trial judge, as the actual sentencer, was presumed to know and to apply the limiting construction of the heinous, atrocious or cruel aggravator as set forth in the Florida Supreme Court in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Under Teague, the Florida Supreme Court's rejection of Maynard prior to Espinosa cannot be defeated unless it is "patently unreasonable." Butler v. McKellar, 494 U.S. 407, 422 (1990). Yet, the reasoning of the Florida Supreme Court was implicitly approved in Walton v. Arizona, 497 U.S. 639 (1990). In Walton, this Court expressly aligned Florida with the Arizona scheme requiring sentencing by a trial judge only: "We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury." 497 U.S. at 647. Walton went on to reject a Godfrey/Maynard claim:

Maynard v. Cartwright and *Godfrey v. Georgia*, however, are distinguishable in two constitutionally significant respects. First, in both *Maynard* and *Godfrey* the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague. See 486 U.S., at 358-359, 363-364, 108 S. Ct., at 1856-1857, 1858-1859; 446 U.S., at 426, 100 S. Ct., at 1763-1764. Neither jury was given a constitutional limiting definition of the challenged aggravating factor. Second, in neither case did the state appellate court, in reviewing the propriety of the death sentence, purport to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented. 486 U.S., at 364, 108 S. Ct., at 1859; 446 U.S., at 429, 100 S. Ct., at 1765 (plurality opinion). These points were crucial to the conclusion we reached in *Maynard*. See 486 U.S., at 363-364, 108 S. Ct., at 1858-1859. They are equally crucial to our decision in this case.

When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*. But the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the "especially heinous, atrocious or depraved" aggravating circumstance, we presume that Arizona

> trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor. Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

497 U.S. at 653-654. Since the same two distinctions found to be "constitutionally significant" in Walton relating to Godfrey and Maynard apply in Florida, the Florida Supreme Court's pre-Espinosa rejection of Maynard was well-grounded and must be deemed reasonable.

Furthermore, the view of a state's highest court as to the meaning of its own law is highly relevant. In Stringer v. Black, 503 U.S. 222, 234-235 (1992), this Court noted that it was "dispositive" that the Mississippi Supreme Court had "at all times viewed its sentencing scheme as one in which aggravating factors are critical in the jury's determination whether to impose the death penalty," and had, consequently, applied and been bound by Godfrey. Thus, the Florida Supreme Court's determination that the jury role in sentencing was not so significant that the entire sentencing process would be infected if a particular aggravating factor was insufficiently defined for

the jury is entitled to great consideration in addressing the effect of Godfrey in Florida.

Lambrix points to the Florida Supreme Court's opinions in Tedder v. State, 322 So. 2d 908 (Fla. 1975) and LeDuc v. State, 365 So. 2d 149 (Fla. 1978), cert. denied, 444 U.S. 885 (1979) (applying Tedder) as support for his contention that trial judges in Florida have long been required to accord deference to the recommendation of the sentencing jury. However, Tedder was cited in this Court's Proffitt decision, and cannot negate the characterization of the jury role as "merely advisory." In addition, the Florida Supreme Court has expressly rejected the suggestion that Tedder elevated the jury role to one of sentencer. In response to the opinion of the Eleventh Circuit in Mann v. State, 817 F.2d 1471 (11th Cir. 1987), adhered to 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1071 (1989), the Florida Supreme Court addressed the jury's role in sentencing in Combs v. State, 525 So. 2d 853, 855 (Fla. 1988), "because we are deeply disturbed about the interpretation of Florida's death penalty process" expressed in Mann and Adams v. Wainwright, 816 F.2d 1493 (11th Cir. 1987), reversed, 489 U.S. 401 (1989). In Mann and Adams, the Eleventh Circuit held that the standard jury instructions and comments by the prosecutors which informed the jury that their role was advisory had violated Caldwell v. Mississippi, 472 U.S. 320 (1985). In Combs, the Florida Supreme Court disagreed with the application of Caldwell to Florida's sentencing scheme:

> Clearly, under our process, the court is the final decision-maker and the sentencer -- not the jury. This Court had no intention of changing the clear statutory directive that the jury's role is advisory when we held that, before a judge may override a jury recommendation of life imprisonment, he must find the facts are 'so clear and convincing that

> virtually no reasonable person could differ,' *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

525 So. 2d at 857.[4] See also, Grossman v. State, 525 So. 2d

[4] Section 921.141, Fla. Stat., reads in material part:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty. - Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

833, 839-840 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989):

> It is clear, then, that the prosecutor correctly stated the law in Florida: the judge is the sentencing authority and the jury's role is merely advisory. ... We are not persuaded that the weight given to the jury's advisory recommendation is so heavy as to make it the de facto sentence. Our case law contains many instances where a trial judge's override of a jury recommendation of life has been upheld. ... Notwithstanding the jury recommendation, whether it be for life

(3) Findings in support of sentence of death. - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence. - The judgment of conviction and sentence of death shall be subject to automatic review by the Surpeme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

> imprisonment or death, the judge is required to make an independent determination, based on the aggravating and mitigating factors.

825 So. 2d at 839-840. Accord, Randolph v. State, 463 So. 2d 186, 192 (Fla. 1984), cert. denied, 473 U.S. 907 (1985); Engle v. State, 438 So. 2d 803, 813 (Fla. 1983) ("trial judge ... is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence"), cert. denied, 465 U.S. 1074 (1984); Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980) (reversing a death sentence and remanding for further consideration where trial judge "gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed.")

Godfrey obviously never addressed the question of who the sentencer was in Florida. When that question was unexpectedly answered in Espinosa, this Court *did not adopt* the Florida Legislature's election that the judge is the sentencer, but, contrary to the clear provisions of Florida's statute and the aforecited Florida Supreme Court precedents, held that "Florida has essentially split the weighing process in two" and "place[d] capital sentencing authority in two actors rather than one." 505 U.S. at 1082. This is central to Glock's holding that Espinosa created a new rule: the novel principle that when a procedure divides sentencing responsibility between a judge and jury, the constitutionally sound, independent reweighing of aggravating and mitigating circumstances by the trial judge will not cure a jury's consideration of a vague jury instruction defining a particular aggravator.

Although Lambrix suggests that the finding of a new rule in Glock was premised on the fact that the trial judge in that case did not consider the heinous, atrocious or cruel factor, a review

of the Glock decision does not support the suggestion that the trial judge's rejection of this factor had any relevance to the Teague analysis conducted. To the contrary, the survey of the legal landscape that resulted in the conclusion that existing case law did not dictate Espinosa was not tied to the facts underlying Glock's conviction and sentence beyond the fact that Glock's sentence became final on December 29, 1986.

Clearly, no case prior to 1986 had applied Godfrey to a sentencing scheme similar to that in Florida. The fact that Stringer held that Maynard and Clemons were dictated by Godfrey does not compel the conclusion that Espinosa was similarly dictated. Oklahoma and Mississippi are both jury sentencing states, like Georgia. Therefore, the application to Godfrey in those states did not involve an extension of the Godfrey precedent by applying it in a novel setting. Espinosa, however, did involve such an extension, thereby creating a new rule. See, Stringer, 503 U.S. at 228; Butler v. McKellar, 494 U.S. at 414-415.

B. Existing case law would not support any holding that in Florida instructional error defining an aggravator is not cured by either the trial court's or the appellate court's application of a proper narrowing construction of that aggravator.

Even if this Court believes that the Florida Supreme Court seriously misjudged Godfrey's applicability in Florida because Tedder's required deference to the jury recommendation placed Florida closer to the jury sentencing states than the judge sentencing states, the Espinosa decision espoused a new rule for Teague purposes in another aspect. Specifically, Espinosa extended Godfrey by granting relief despite the fact that the Florida Supreme Court had properly applied its limiting interpretation of the heinous, atrocious or cruel aggravator on the

facts of that case. As the Eleventh Circuit noted in Glock, the Godfrey opinion "was less concerned with the jury's consideration of an unconstitutionally vague aggravator than with the Georgia Supreme Court's failure to review and check the jury's unchanneled discretion." 65 F.3d at 885. Godfrey's focus on the state appellate court's narrowing function is also evident in the claims raised by Lambrix prior to Espinosa. These claims challenged the adequacy of the Florida Supreme Court's interpretation of the heinous, atrocious or cruel and the cold, calculated and premeditated aggravating factors, and challenged the application of these factors to the facts of his case; they did not focus on the adequacy of the jury instructions on these factors. See, J.A. 34-44; 3.850 Record at 88-96.

Although Lambrix's brief repeatedly asserts that relief in this case is dictated by Godfrey, neither the facts nor the legal holding of Godfrey are ever discussed. Godfrey was sentenced to death for killing his estranged wife and her mother with a shotgun. The sentences imposed rested solely on the aggravating factor of "outrageously or wantonly vile, horrible or inhuman." Although the Georgia Supreme Court had, through case law, limited the application of this aggravating factor, the particular facts of Godfrey did not fit within the narrow construction that had been developed. Specifically, the lack of physical torture or an aggravated battery on either victim prior to the fatal shotgun blasts took the case outside of the application of this aggravating factor. Thus, this Court concluded that the sentencing jury's unchanneled discretion was not cured by the affirmance of the death sentences by the Georgia Supreme Court.

The Godfrey Court's holding that the sentencing jury had not been provided sufficient guidance as to the definition of the aggravating factor at issue is not a significant aspect of that case. In fact, recognition of the inadequacy of this factor was

expressed in Gregg v. Georgia, 428 U.S. 153 (1976), wherein this Court noted

> It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and *there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.*

428 U.S. at 201 (emphasis added). The focus in Godfrey followed the concern from Gregg that the Georgia Supreme Court had failed to adequately narrow the definition of this factor on the facts presented in Godfrey.

Gregg and Godfrey are natural extensions of Furman v. Georgia, 408 U.S. 238 (1972), and the fundamental concept that a capital punishment statute must channel and limit the sentencer's discretion in order to minimize the risk of wholly arbitrary and capricious action. In Florida, this principle was accomplished by providing adequate guidance to the sentencing authority, i.e. the trial judge, and requiring the judge to articulate in writing the findings in support of the imposition of a death sentence. Proffitt, 428 U.S. at 253. Therefore, as long as a trial judge's finding of heinous, atrocious or cruel was supported by the facts of the case falling within the narrowing construction developed by the Florida Supreme Court, no constitutional error could be deemed to have infected the sentencing process under Godfrey.

Espinosa, for the first time, cited Godfrey in granting relief to a death sentenced state prisoner despite the prisoner's having committed a murder which was unquestionably heinous, atrocious or cruel. See, Espinosa v. State, 626 So. 2d 165 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 2184 (1994)

(instructional error harmless as jury would have found factor even if proper limiting instruction had been given). The victim in Espinosa was in her home when Espinosa and his codefendant came in, struggled with, shot and stabbed her husband, then dragged the victim into her bedroom where she was suffocated with a pillow and repeatedly stabbed. Espinosa v. State, 589 So. 2d 887, 889 (Fla. 1991). The trial judge found the heinous, atrocious, or cruel factor to apply, and in affirming this factor the Florida Supreme Court stated that the finding "was supported by the medical examiner's testimony that Teresa was alive while she was being strangled and repeatedly stabbed." 589 So. 2d at 894. Although this Court noted that "the trial judge did not directly weigh any invalid aggravating circumstances," presumably because the factor, as applied and affirmed on appeal, was within the narrow construction that had been adopted by the Florida Supreme Court, relief was nonetheless granted in Espinosa under the presumption that, as weighed by the jury, the instruction was vague. 505 U.S. at 1082.

Thus, Espinosa shifted the Godfrey focus away from the state appellate court's application of a limiting, narrow construction to the instructional error itself. Although we now know that, in order for an appellate court to cure such instructional error, it is necessary for the court to thoroughly analyze the role that the invalid instruction may have played in the sentencing process, this is not knowledge which was compelled by Godfrey. The Godfrey Court did not reject the Georgia Supreme Court's affirmance as a cure to the jury instructional error due to the lack of a reweighing or harmless error analysis, it rejected the affirmance as a cure because the facts of that case did not fall within the narrow construction that the Georgia Supreme Court had adopted. See, 446 U.S. at 429, 432 ("The Georgia courts did not, however, so limit Sec. (b)(7) in the present case"). This Court concluded

> Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind . . . ." We conclude that the answer must be no.

446 U.S. at 432 (footnote omitted). In Espinosa, as in the instant case, the Florida Supreme Court did apply a constitutional construction of the heinous, atrocious or cruel aggravating circumstance. The above language from Godfrey would therefore suggest that Espinosa's and Lambrix's sentences were valid; relief in these cases was not dictated by Godfrey.

Lambrix's brief asserts that the trial court compounded the instructional error in his case by directly weighing the heinous, atrocious or cruel factor, and that the Florida Supreme Court failed to cure the error because it did not expressly consider the effect of the insufficient aggravating instructions in affirming his sentence. However, the reasoning behind these conclusory assertions is never offered. Certainly, the trial judge is presumed to know and to apply the factor as it has been narrowly construed by the Florida Supreme Court. Walton, 497 U.S. at 654. The facts of this case in no way rebut this presumption; to the contrary, they support the trial judge's finding of heinous, atrocious or cruel. One victim was manually strangled, and the other was repeatedly struck about the face and head with a tire tool. The cold, calculated and premeditated factor was also properly applied, based on the evidence that Lambrix individually enticed the victims outside under the ruse of seeing nonexistent plants. The trial judge's proper consideration of these factors did not compound any instructional error, it

demonstrated that any error was harmless since the jury would have properly considered the factors as well, even if a limiting instruction had been given. Cf. Sochor v. Florida, 504 U.S. 527 (1992).

The Florida Supreme Court's failure to specifically address the consequence of the jury instructions given is a result of Lambrix's procedural default (see II, infra). Since Espinosa, the Florida Supreme Court has consistently held insufficient jury instructions to be harmless where the facts of the case support the applicability of the aggravator under the constitutionally narrow construction. See, Krawczuk v. State, 634 So. 2d 1070, 1073 (Fla.), cert. denied, ___ U.S. ___, 115 S. Ct. 216 (1994); Davis v. State, 620 So. 2d 152, 153 (Fla. 1993), cert. denied, 510 U.S. 1170 (1994); Slawson v. State, 619 So. 2d 255, 261 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 2765 (1994); Happ v. State, 618 So. 2d 205, 206 (Fla.), cert. denied, 510 U.S. 925 (1993); Foster v. State, 614 So. 2d 455 (Fla. 1992), cert. denied, 510 U.S. 951 (1993). The Florida Supreme Court upheld the application of these factors in Lambrix's case, again demonstrating the harmlessness of any instructional error. Clemons v. Mississippi, 494 U.S. 738 (1990) (state appellate court can either determine that evidence supports aggravator as properly defined *or* conduct appropriate reweighing/harmless error analysis).

A finding that Espinosa announced a new rule in this respect is further strengthened by Walton, supra. As noted previously, one of the "constitutionally significant" distinctions this Court drew in declining to apply Godfrey and Maynard in Arizona was the fact that the state appellate courts in Maynard and Godfrey had failed to affirm the death sentences by applying a limiting definition to the facts presented. 497 U.S. at 653. Arizona, however, had adopted a construction "similar to the construction of Florida's 'especially heinous, atrocious, or cruel'

aggravating circumstance that we approved in Proffitt." 497 U.S. at 655.

Although Lambrix asserts that Stringer "has already resolved every possible Teague issue," Stringer could not have considered whether applying Godfrey to find constitutional error when the facts of a particular case fell within the narrow construction of an aggravator would amount to a new rule, since the facts of Maynard and Clemons, like Godfrey, did not fall within the aggravators as narrowly construed by the state appellate courts. In Maynard, this Court emphasized that an Eighth Amendment vagueness challenge is determined on an as-applied basis: "Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." 486 U.S. 361. Under such analysis, no constitutional error occurs when the sentencer weighs a non-vague, i.e. properly applied, aggravator.

The prior approval of Florida's heinous, atrocious, or cruel aggravator by this Court in Proffitt and the obvious application of the narrow construction so approved to the facts presented in Espinosa are not acknowledged or addressed in the Espinosa opinion. Clearly, however, this Court broke new ground in Espinosa by extending Godfrey to a case in which the narrow constitutional construction of the challenged aggravator indisputably applied.[5]

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[5] Lambrix makes no argument that one of the exceptions set forth in Teague would apply, should this Court determine Espinosa to be new. However, it is clear, as the court held in Glock, neither exception would operate to permit consideration of Lambrix's claim. The rule would not place Lambrix's conduct beyond the power of law making authority to proscribe, since the prosecution of capital murder would not be prohibited. Nor does the absence of the new rule seriously diminish the likelihood of an accurate conviction. Consequently, neither exception would apply.

II. EVEN IF LAMBRIX'S ESPINOSA CLAIM IS NOT BARRED UNDER TEAGUE, NO RELIEF IS WARRANTED IN THIS CASE.

A. The existence of a state procedural bar precludes federal consideration of this issue under Wainwright v. Sykes.

Should this Court determine that the Eleventh Circuit improperly declined to review Lambrix's Espinosa claim under Teague, there is no reason to remand this cause for further consideration of the Espinosa issue since federal relief must be denied in this case due to the clear procedural default committed in state court. The Florida Supreme Court expressly found Lambrix's Espinosa claim to be procedurally barred. Lambrix v. Singletary, 641 So. 2d at 848. The bar occurred in 1986, when Lambrix failed to raise the denial of his requested instruction on the heinous, atrocious or cruel aggravating factor in the direct appeal from his convictions and sentences. The Florida Supreme Court has consistently required that an Espinosa issue must have been objected to at trial and pursued on direct appeal in order to be reviewed in postconviction proceedings. See, Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994); Jackson v. Dugger, 633 So. 2d 1051, 1055 (Fla. 1993); Henderson v. Singletary, 617 So. 2d 313 (Fla.1993).

Although Lambrix attempted to raise claims attacking the validity of the heinous, atrocious or cruel and cold, calculated and premeditated aggravating factors based on an allegation that the Florida Supreme Court had failed to interpret those factors in a constitutionally acceptable manner during his state court postconviction proceedings, it is clear that no state court ever rendered any opinion as to the merits of his claims which did not focus on the jury instructions but involved a purely defaulted assault on the factors. Coleman v. Thompson, 501 U.S. 722, 736

(1991) (presumption that state court reached the federal question at issue only applies where it fairly appears the state court rested its decision on federal grounds). The trial judge, in denying the postconviction motion, concluded only that Lambrix was entitled to no relief. The state had responded to the claims by asserting that a clear procedural bar applied. The claims were not raised in the appeal from the denial of the postconviction motion, as is clear from the Florida Supreme Court opinion stating that only two issues, both relating to Lambrix's consumption of alcohol, were raised in that appeal. See, Lambrix v. State, 534 So. 2d at 1152. Lambrix has never identified any statement from any state court addressing the merits of these claims.

On these facts, federal habeas relief based on Lambrix's Espinosa claims is precluded by the existence of an independent state law basis for the rejection of these claims. Wainwright v. Sykes, 433 U.S. 72 (1977). Under this Court's decision in Sochor, supra, there is absolutely no question that claims of this nature can be procedurally barred. This Court can and should uphold the express procedural default applied in this case by the Florida Supreme Court.

B. Any instructional error as to the heinous, atrocious or cruel or cold, calculated and premeditated aggravating factors had no injurious affect on the sentencing process.

Finally, it must be noted that no finding of constitutional error is warranted, because the recommending jury, the sentencing judge, and the Florida Supreme Court all should have found and applied both the heinous, atrocious or cruel and cold, calculated and premeditated aggravators on the facts of this case. Both the Eleventh Circuit and the Florida Supreme Court have specifically found that the facts of this case support the finding of both aggravating factors, as narrowly construed in Florida. 72 F.3d at 1507; 494 So. 2d at 1148. These findings are clearly

justified when the facts of this case are considered in light of the relevant case law in Florida.

The finding of heinous, atrocious or cruel as to Alicia Bryant is well supported. Lambrix told Francis Smith that he had to run after Alicia, that she had put up a real fight. He stated that he choked her, then stomped on her head, and left her in a face down in a pond to ensure her death. He admitted that Alicia had spit blood on him. The medical examiner confirmed that Alicia had been manually strangled and suffered painful injuries prior to her death.

This Court has recognized that the Florida Supreme Court "has consistently held that heinousness is properly found if the defendant strangled a conscious victim." Sochor v. Florida, 504 U.S. at 537.. See also, Orme v. State, 21 Fla. L. Weekly S195 (Fla. May 2, 1996) ("strangulation creates a prima facie case for this aggravating factor"); Doyle v. Singletary, 655 So. 2d 1120, 1121 (Fla. 1995) ("Murder by strangulation has consistently been found to be heinous, atrocious or cruel"); Castro v. State, 644 So. 2d 987, 989 (Fla. 1994); Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986), cert. denied, 483 U.S. 1033 (1987). No serious argument can be made that Alicia's death failed to meet the narrow construction of this aggravator as consistently applied by the Florida Supreme Court.

The killing of Clarence Moore similarly fell within the narrow construction of this factor. Moore was repeatedly struck in the head and face with a tire tool. The medical examiner testified that Moore died from severe, crushing injuries to his skull, and that there were at least ten separate blows, including four to each side of his head. In Colina v. State, 634 So. 2d 1077, 1081 (Fla.), cert. denied, ___ U.S. ___, 115 S. Ct. 330 (1994), this factor was upheld by the Florida Supreme Court on comparable facts (victim repeatedly struck in head and face with

tire iron). See also, Penn v. State, 574 So. 2d 1079 (Fla. 1991) (sleeping victim struck in head over thirty times with claw hammer); Bruno v. State, 574 So. 2d 76 (Fla.) (victim beaten about the head and shoulders over ten times with a crowbar), cert. denied, 502 U.S. 834 (1991); Cherry v. State, 544 So. 2d 184 (Fla. 1989) (victim struck around head five times with hand, fist, or blunt instrument), cert. denied, 494 U.S. 1090 (1990). The lack of evidence affirmatively establishing Moore's degree of consciousness during the entire attack does not preclude the application of this factor. Colina; Taylor v. State, 630 So. 2d 1038 (Fla. 1993).

The findings of the cold, calculated and premeditated factor as to both these murders are also factually correct. The evidence showed that Lambrix used subterfuge to entice these victims out of the trailer individually, armed himself with the tire tool, and violently killed them. He returned to the trailer and calmly cleaned up, stopping to enjoy a plate of spaghetti before burying the bodies and taking Moore's car to travel to his sister's house. The trial court specifically noted the lack of provocation between the parties (J.A. 20).

The Florida Supreme Court approves the finding of the cold, calculated and premeditated factor where the evidence shows that the killing was the product of cool, calm reflection, not prompted by emotional frenzy or rage, that there was a careful plan or prearranged design to commit the murder, and that the defendant had no pretense of moral or legal justification. Gamble v. State, 659 So. 2d 242, 244 (Fla. 1995). Relevant considerations are the advance procurement of a weapon, the lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. Stein v. State, 632 So. 2d 1361, 1366 (Fla.), cert. denied, ___ U.S. ___, 115 S. Ct. 111 (1994). The Florida Supreme Court has consistently upheld this factor where a defendant uses a ruse to lure the victim to an isolated

spot or to gain access to the victim. See, Atwater v. State, 626 So. 2d 1325, 1329 (Fla. 1992), cert. denied, ___ U.S. ___, 114 S. Ct. 1578 (1994); Henry v. State, 613 So. 2d 429, 433-434 (Fla. 1992), cert. denied, 510 U.S. 1048 (1994); Fotopoulos v. State, 608 So. 2d 784, 792-793 (Fla. 1992), cert. denied, 508 U.S. 924 (1993); Johnson v. State, 608 So. 2d 4, 11 (Fla. 1992), cert. denied, 508 U.S. 919 (1993). The facts of this case permit the application of this factor under the narrower construction since the evidence shows a prearranged plan for the victims' deaths.

Due to the nature and purpose of collateral review, federal constitutional error cannot compel habeas relief unless the error had substantial and injurious effect or influence on the case. Brecht v. Abrahamson, 507 U.S. 619, 622 (1993). The facts of this case clearly demonstrate that no such effect or influence can be found with regard to the jury's recommendation based on any claim of inadequacy in the jury instructions defining either the heinous, atrocious or cruel or cold, calculated and premeditated aggravating factors. Since the facts of this case met the narrow construction of those factors, as every court to have considered the issue has found, the jury properly considered and applied the aggravators. In addition, three other aggravating factors apply to the murder of Moore and two others apply to Bryant's death. On these facts, any possible error must be considered harmless and without prejudice. Accord, California v. Roy, 60 Cr. L. Rptr. 3067 (November 1, 1996) (applying Brecht to jury instruction claim). Lambrix has not been "grievously wronged" so as to justify collateral relief. 507 U.S. 637. Because the facts of this case clearly demonstrate that any constitutional error occurring due to the jury having been given insufficient guidance as to the definition of the heinous, atrocious or cruel and cold, calculated and premeditated aggravating factors was necessarily harmless, no habeas relief is warranted.

III. APPLICATION OF ESPINOSA V. FLORIDA TO THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR WOULD CREATE A NEW RULE IN VIOLATION OF TEAGUE V. LANE.

Lambrix also challenges the jury instruction provided in his sentencing proceeding on the aggravating factor of cold, calculated, and premeditated. Of course, if this Court determines that Espinosa announced a new rule, this argument must be rejected on that ground. Even if Espinosa is found to have been dictated by Godfrey, however, a separate Teague analysis is required before Espinosa can be used to invalidate Lambrix's sentence due to any alleged infirmity in the cold, calculated and premeditated instruction. Such analysis demonstrates that applying Espinosa to this aggravator would violate Teague by creating a new rule in a federal habeas proceeding.

This Court has never, to date, held Florida's jury instruction on the cold, calculated and premeditated aggravating factor to be constitutionally inadequate, nor has this Court found any similar factor or instruction from another state to have been impermissibly vague. To the contrary, this Court has upheld Idaho's narrow construction of its "utter disregard for human life" aggravator which refers to the killer as a "cold-blooded, pitiless slayer." Arave v. Creech, 507 U.S. 463, 471-472 (1993). The exact jury instruction given in Lambrix's case - "that the crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification" - is clearly more comparable to the "cold-blooded, pitiless slayer" language upheld in Arave than it is to the "pejorative adjectives" included in the heinous, atrocious or cruel type aggravators which this Court has consistently found to be constitutionally lacking. (J.A. 9); 507 U.S. at 472. The terms involved in the cold, calculated

and premeditated factor are ordinary words with objective meanings, easily distinguished from the inherently ambiguous language involved in the heinous factors which this Court has invalidated. See also, Harich v. Dugger, 813 F. 2d 1082, 1102 (11th Cir. 1987), approved, 844 F. 2d 1464, 1468-69 (11th Cir. 1988) ("This aggravating circumstance [cold, calculated and premeditated], as so construed, provides adequate guidance both to the sentencing court and to the advisory jury"), cert. denied, 489 U.S. 1071 (1989).

Moreover, an ordinary person would not believe that every murder in Florida, indeed not even every premeditated murder in Florida, would be properly characterized as cold, calculated and premeditated without any pretense of moral or legal justification. Jurors in Florida are instructed that premeditation may be formed in a moment and that there is no prescribed length of time which must elapse between the formation of the purpose to kill and the execution of the intent; it may occur a moment before the act. Spencer v. State, 645 So. 2d 377, 382 (Fla. 1994). The elements of coldness, calculation, and the lack of legal or moral justification for the murder are not included in every case which the jury has found the murder to have been premeditated.

Lambrix's reliance on Jackson v. State, 648 So. 2d 85 (Fla. 1994), to demonstrate constitutional infirmity in the jury instruction provided to his jury on the cold, calculated and premeditated instruction is misplaced. Jackson is an evolutionary decision to provide additional guidance to jurors as to the definition of this factor; it does not establish that the jury instruction given to Lambrix's jury was constitutionally insufficient. Cf., Wainwright v. Stone, 414 U.S. 21 (1973) (recognizing Florida Supreme Court's prospective-only application of narrower interpretation of statute).

The Florida Supreme Court has always interpreted this factor to require more than the standard premeditation necessary to support a first degree premeditated murder conviction. See, Jent v. State, 408 So. 2d 1024 (Fla. 1981). Thus, that court has conducted the constitutionally required narrowing function to permit the jury's reliance on that factor when properly construed. Consequently, Godfrey would not compel the conclusion that this aggravating factor was unconstitutionally vague.

Since the cold, calculated and premeditated factor employs ordinary terms of common, objective understanding; since ordinary jurors would not reasonably believe that every death-qualified murder in Florida would be encompassed in the statutory language of this factor; and since the Florida Supreme Court has consistently fulfilled its duty to interpret this aggravator in a constitutionally acceptable manner, consideration of this factor in Lambrix's case did not constitutionally infect his sentence. To hold otherwise would require the application of a new rule not dictated by Godfrey, Maynard or even Espinosa. Such a new rule in this proceedings is strictly prohibited by Teague.

CONCLUSION

For the foregoing reasons and citations to authority, the Respondent, HARRY K. SINGLETARY, JR., urges this Honorable Court to affirm the opinion of the Eleventh Circuit Court of Appeals in all respects.

Respectfully submitted,

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